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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-1647

MOBIL OIL CORPORATION, a Corporation, SUNRAY-DX OIL COMPANY, a Corporation, KERR-McGEE CORPORATION, a Corporation, and PHILLIPS PETROLEUM COMPANY, a Corporation,

Petitioners,

VERSUS

STANDARD INLUSTRIES, INC., a Corporation, and METROPOLITAN PAVING CO., INC., a Corporation,

Respondents.

BRIEF FOR PLAINTIFF-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Brief is submitted on behalf of two asphalt-consuming contractors whose judgment for money damages was affirmed by the United States Court of Appeals for the Tenth Circuit on March 14, 1973.

OPINIONS BELOW AND JURISDICTION

The opinion below and the basis asserted for this Court's jurisdiction is adequately set forth in the Petition and its Appendices.

QUESTIONS PRESENTED

Petitioner's first question incorporates an erroneous characterization of the conspiracy alleged by Plaintiffs, *and* a misleading synopsis of the holding of the court below in regard to that conspiracy. The question presented by Petitioners commences: "May Plaintiffs in antitrust actions submit to the jury elaborate and extensive evidence concerning alleged conspiracies *other than that charged by them* . . .?" Petitioner's entire argument is constructed upon this faulty foundation. The liability evidence adduced by Plaintiffs plainly was in support of their allegation of a single but multi-faceted conspiracy engaged in by asphalt marketers in three states and affecting the price of liquid asphalt in a three-state market; this is true even though Plaintiffs purchased their asphalt only in the Oklahoma sector of that market. We submit that the question, correctly stated, should be "whether plaintiffs alleging an antitrust price-fixing conspiracy covering a three-state market must be *restricted* at trial to proof of conspiratorial acts engaged in by sellers *solely* in the geographic area of the market where plaintiff's purchases were made?"

STATEMENT OF THE CASE

Petitioner's statement of the case is slanted, and based upon the same erroneous characterization of Plaintiff's pleadings and the court's holding as was their above quoted "question." Additionally, the statement totally ignores the logical inferences which were obviously drawn from the evidence presented at trial as the jury resolved contested issues of fact in favor of the Plaintiffs and against Defendants. We do not propose to set forth here a complete state-

ment of all the issues involved in the case at bar; however, we propose to correctly set forth the evidentiary framework of Plaintiff's case (together with all legitimate inferences) which was approved by the Court of Appeals.

Plaintiffs proved to the satisfaction of the court and jury below that the defendants in the case at bar, together with other named refiners in the market, effectively fixed and maintained the price of liquid asphalt at an artificially high level in an economic market composed of the States of Oklahoma, Kansas and approximately the western half of Missouri during the years 1961 through 1966 (R. 161, pp. 694, *et seq.;* A. 3521-3525. R. 161, pp. 636, *et seq.*, Instruction Nos. 10, 22 and 24; A. 3517).[1] There was evidence demonstrating that the foregoing geographic area constituted the relevant market within which to consider the anti-competitive acts of the industry as a whole, and a portion of the area from which a consideration of prices was necessary in order to compute the damages suffered by the Plaintiffs as a consumers of liquid asphalt. (*Max,* R. 19, pp. 3147-3148; A. 1424).

During the period of time involved, all petroleum-based products, except one, which were produced from refineries in Kansas and Oklahoma [*i.e.*, gasoline, kerosene, fuel oils, *etc.*] moved easily, *and competitively,* across the Kansas-Oklahoma border; only liquid asphalt was an ex-

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[1] References are as follows:
References to witnesses' trial testimony are made by referring to the particular witness' last name. References to the record are to Record Volume Number preceded by the letter "R" and then to page or Exhibit number. References to the Appendix are to the Appendix page number, preceded by the Letter "A".

ception. [*Nourse*, R. 4, pp. 110-111; A. 61-62. *Baker*, R. 5, pp. 144-15, 204; A. 75-76, 91]. The Kansas and Oklahoma based refiners assiduously avoided marketing liquid asphalt across their common border when, had the market been truly competitive, it would have been in their obvious economic self-interest to market as much asphalt as possible in the "high priced" Oklahoma-Kansas sector of this market [*Max*, R. 19, pp. 3185-3186; A. 1448]; however, the asphalt refiners in both states marketed *millions* of gallons of liquid asphalt in the lower-priced, distant northern markets. [*Mitchell*, R. 10, p. 1125; A. 515. *Noble*, R. 10, pp. 1970, 1088, 1104 and 1114; A. 490, 505. *Max*, R. 19, pp. 3158 and 3185; A. 1430 and 1448; R. 119, P. Exs. 748, 750, 754, 758, 786 and 787]. As indicated, with practically no pertinent exceptions, liquid asphalt was never marketed competitively, by *any* refiner, across what one witness referred to as the "Berlin Wall." [*Smith*, R. 9, p. 920; A. 438. *Nourse*, R. 4, p. 43; A. 43. *Foose*, R. 5, p. 260; A. 109. *Baker*, R. 5, p. 144; A. 75. *Hibbard*, R. 5, p. 282; A. 119. *Mance*, R. 7, p. 716; A. 327]. The few pertinent exceptions mentioned above, when liquid asphalt *did* move competitively from one state to the other, resulted in economic reprisals either being instituted, or threatened, against persons purchasing liquid asphalt and utilizing it, or attempting to utilize it, on projects "across the border." [*Adams*, R. 33, pp. 5704-5722; A. 2551-2562. *Baker*, R. 33, p. 5752; A. 2568. *Wilkinson*, R. 33, pp. 5788-5790; A. 2588-2589]. The co-operation between the Kansas and Oklahoma refineries which was necessary to construct this interstate economic barrier was fruitful [*Malloy*, R. 12, pp. 1813-1814; A. 906-907]; it initially allowed the refiners in Kansas and Oklahoma to easily establish *and maintain*

high, artificial F.O.B. refinery prices for their product on sales to their respective states. [*Adamson*, R. 6, p. 443; A. 189]. Then, acting in concert, the Oklahoma and Kansas refiners were able to fix and maintain the price in western Missouri. [*Adamson*, R. 6, pp. 350-463; A. 139-200. *Leftwich*, R. 27, p. 4712; A. 2104. R. 38, P. Ex. 276; A. 2763-2763C. R. 42, P. Ex. 648; R. 119, P. Ex. 749]. All of the evidence demonstrated that once this was accomplished, the price set for the individual state dictated the price charged to *everyone else* who purchased liquid asphalt in that state. [*Hardy*, R. 26, pp. 4433 and 4436; A. 1965-1968. *Mitchell*, R. 13, pp. 1990-1993; A. 978-980. *Cunningham*, R. 23, p. 3911; A. 1724, *Ketcham*, R. 14, p. 2262; A. 1096. *Dahlgren*, R. 11, p. 1569; A. 760-761. *Schimpf*, R. 27, pp. 4738 and 4754; A. 2118. *Max*, R. 34, p. 5875; A. 2630-2631. *Whitson*, R. 18, p. 3033; A. 1360. R. 119, D. Phillips Ex. 12. R. 110, P. Exs. 939, 940 and 941; A. 3159-3163].

Although slightly different mechanical techniques were utilized in fixing the "State" price in each segment of the market, plaintiffs' evidence reflected a basic pattern—a series of uniform, almost indivisible, conspiratorial meetings, spanning a period of many years, held between the "competing" refiners at various places in Oklahoma, Kansas and Missouri. [R. 38, P. Exs. 18, 21; A. 2753-2761. R. 40, P. Exs. 417, 424 and 833; A. 2843, 2867, 2871, 2873, 2899].[2] The State of Kansas took asphalt bids "FOB Destination." Therefore, it was expedient for the Kansas refiners, during their meetings, to utilize various written instru-

[2] See also: R. 38, P. Exs. 39, 51, 55 and 64. R. 42, P. Exs. 579-585, 588-594, 629, 669-673. R. 39. R. 40. R. 41.

ments to perpetuate their fraud on the Kansas Highway Department, since more than one F.O.B. "base" price had been established for liquid asphalt in Kansas. [*Adamson*, R. 6, pp. 412-444; A. 173-190. R. 42, P. Ex. 649; A. 3001-3001C. One established price was utilized for the El Dorado, Kansas "group" of refineries, and a different base price was utilized for the Kansas City group.] The "work sheets" from which these self-styled competitors rigged their bids, thereby establishing collusive, non-competitive asphalt prices to the State of Kansas were introduced into evidence by the plaintiffs.[3] The State of Oklahoma took liquid asphalt bids "FOB Refinery," and all refiners located in the Oklahoma sector of the market maintained high, constant, *identical* F.O.B. refinery prices, and submitted high, constant, *identical* bids to the State of Oklahoma for more than a decade. [*Nourse*, R. 4, pp. 24, 29-32, 49 and 50; A. 25, 28 and 39. R. 119, P. Ex. 761]. There was only one (identical) "base" price for asphalt in Oklahoma, and thus

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[3] These instruments are referred to in the record, by various individuals, as the "bible," the "sheets," the "work sheets," and, perhaps, other appellations. The work sheet was merely an instrument (usually a State Highway Department bid sheet) which was handed to each party (or representative of a party) by the organizer of the clandestine meeting and which had freight rates already computed for the points on which that "competitor" was to be the "low" bidder and to receive, by prearrangement, the award from the State. In those rare instances where it had not already been done on the "sheet" by the organizer of the meeting, the "winning" company had merely to add the attached freight rate to the applicable base price listed on the first page of the instrument, and then bid that total or slightly thereunder. All others bid above that price. These sheets were utilized in the same manner in the market area for a number of years. [*Malloy*, R. 12, p. 1856; A. 929 *Gardner*, R. 11, p. 1294; A. 599. *Noble*, R. 10, p. 1088; A.. 505]. Most of the sheets were destroyed after they had served their purpose [*Mitchell*, R. 10, pp. 1158, *et seq.*; A. 533-534. *Mance*, R. 7, pp. 683-684; A. 309. However, plaintiffs were able to secure the Kansas "sheet" for one of the years in question.

no occasion arose for the Oklahoma conspirators to utilize a "work sheet" to rig the bids to the State of Oklahoma. [*Patton*, R. 13, p. 1971; A. 969. R. 119, P. Ex. 761]. As previously stated, the price of asphalt in Kansas was, roughly .02¢ per gallon *lower* than the price in Oklahoma [*Ketcham*, R. 14, pp. 2261 and 2267; A. 1096, 1099. *Black*, R. 6, p. 514; A. 226]; and, so long as there was no Kansas refiner bidding across the border competitively (*i.e.*, at the *lower* Kansas price) to the State of Oklahoma, the price of liquid asphalt to the State of Oklahoma could effectively be fixed and maintained merely by the submission of identical "competitive" bids to the State. This was done by *every* refiner in the State of Oklahoma on *every* State asphalt letting (each of which called for the submission of secret, sealed bids) during *every* year from 1954 through 1965, inclusive. [R. 119, P. Ex. 761]. This was the *only* product purchased by the State of Oklahoma under its competitive bidding procedure which behaved, price-wise, in this manner.[4] [*Whitson*, R. 18, p. 3109; A. 1401. *Max*, R. 19, p. 3159; A. 1431. *DePodwin*, R. 32, p. 5553; A. 2472. R. 109, P. Exs. 876-881; A. 3025-3059]. Although the evidence reflects that the Kansas-Oklahoma border was strangely, almost perversely, impervious to liquid asphalt traffic, just the opposite was true of the Missouri border where the Kansas and Oklahoma refiners acted in concert to fix the

[4] The record also reflects that every Oklahoma state letting was preceded by a private meeting of the Oklahoma Asphalt Refiners Association. Other evidence of collusion in the Oklahoma sector of the market consisted of correspondence between members of that association, setting forth the points on the upcoming Oklahoma letting on which certain refiners were to bid. [*Carleton*, R. 11, pp. 1432, 1435, 1437-1438, 1440, 1442 and 1456, *et seq.*; A. 678, 680-684. R. 42, P. Exs. 616 and 617; A. 2995-2999. R. 93, P. Exs. 824, 825 and 831; A. 3015, 3021].

price of liquid asphalt sold to the Missouri State Highway Department in the western half of Missouri. [*Adamson*, R. 6, pp. 350-412; A. 139-174]. Here, like in Kansas, these "competitors" were dealing with two different F.O.B. base prices, and it was expedient for them to utilize a work sheet to simply the business of dividing up the Missouri sector of this market, and fixing the price to be charged to the State of Missouri. A copy of an instrument used one of the years during which the conspiracy was in effect was introduced into evidence.[5] [R. 38, P. Ex. 276; A. 2763-2763C].

The importance of the evidence establishing that the defendants, and others, fixed the price to the individual states comprising this market is fully realized when it is understood that the price paid for liquid asphalt by *every other customer,* whether it was a municipality, county, or private contractor, was based *directly* upon this illegally established and maintained "state" price. [*Mitchell*, R. 13, pp. 1990-1992; A. 978-979. *Schimpf*, R. 27, pp. 4738 and 4754; A. 2118, 2127-2128. *Whitson*, R. 18, p. 3033; A. 1360. *Cunningham*, R. 23, p. 3911; A. 1724. *Dahlgren*, R. 11, p. 1569; A. 760-761. *Max*, R. 34, p. 5875; A. 2630-2631. *Ketcham*, R. 14, p. 2262; A. 1096. *Hardy*, R. 26, pp. 4433, 4436, 4444-4451; A. 1965-1976. *Max*, R. 19, p. 3190; A. 1451-1452].

The absence of voluntary, competitive sales of liquid asphalt across the Oklahoma-Kansas border, the economic

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[5] The evidence also reflects that there were meetings devoted entirely to the exchange of pre-arranged points on Kansas lettings for pre-arranged points on Missouri lettings. [*Adamson*, R. 6, pp. 381, *et seq.*; A. 155-161. *Mance*, R. 7, pp. 690, *et seq.*; A. 312-314]. The evidence also reflected an Oklahoma meeting at which Oklahoma and Missouri business was discussed. [*Malloy*, R. 12, p. 1754; A. 872-873. *Carleton*, R. 11, pp. 1486-1487; A. 713-714].

reprisals engaged in when customers attempted to bring that product across the state line, when combined with the individual anti-competitive acts undertaken by each of the refiners with respect to sales to their home state and jointly in the western half of Missouri led the jury, the trial court, and the Court of Appeals to the inescapable conclusion that the aforementioned three states were integrally a part of the same economic market in which the Kansas and Oklahoma refiners had *not* been freely competing, one against the other, for sales to governmental and private customers. The second conclusion to be drawn from the above is equally obvious. Had such competition ensued, the price of liquid asphalt would have been substantially lower to all customers in the marketplace. [*Max*, R. 34, pp. 5894-5897; A. 2642-2644. *Leftwich*, R. 27, pp. 4713-4716; A. 2104-2105. *Whitson*, R. 18, p. 3035; A. 1361. *Malloy*, R. 12, p. 1779; A. 888].

REASONS FOR DENYING THE WRIT

I

Petitioner's statement that the evidence complained of by them was not evidence in support of Plaintiff's allegations is belied by the pleadings, the record of this case, their own actions in the trial court, and the opinion of the Court of Appeals. Plaintiff's original complaint alleged a multi-state conspiracy, affecting the States of Oklahoma, Kansas and Missouri. The Defendants immediately moved to strike all allegations of conduct outside the State of Oklahoma, the State where the asphalt was purchased by these Plaintiffs. The Defendants were unsuccessful in their attempt to have those allegations stricken, and they went

to trial charged with perpetrating a conspiracy on the asphalt consumers of a three-state market. The evidence adduced at the trial proved Plaintiff's allegations.

It is true that the purchases of liquid asphalt upon which Plaintiffs predicated their *claim for damages* all occurred within the geographic confines of the State of Oklahoma. However, the trial court correctly refused to limit Plaintiff's proof of Petitioners' conspiratorial acts to the situs of the purchases, it being Plaintiff's theory of liability that the conspiracy to fix prices which injured them was operative in the three-state supply market above. Under pertinent instructions by the trial court, the jury found that the Plaintiffs were damaged as a result of the *conspiracy alleged*. The Court of Appeals approved that ruling, in pertinent part as follows:

> "As a part of their case, the plaintiffs, over objection, introduced evidence that the conspiracy in question did not respect state boundaries and that its effect was felt in Kansas and Western Missouri to the end that there was price fixing by certain of these defendants, and others, in those areas, as well as in Oklahoma. Expert testimony adduced by the plaintiffs was to the effect that the relevant economic market included not only Oklahoma, Kansas and Western Missouri, but included also such states as Nebraska, South Dakota, Iowa, Minnesota and Wisconsin.
>
> "It was an integral part of plaintiff's theory of the case that the Oklahoma refiners agreed not to market in Kansas, and that the Kansas refiners in turn agreed not to market in Oklahoma, to the end that the barrier between these two states was described by some as being a veritable 'Berlin Wall,' through which liquid asphalt did not pass from one state to the other, al-

though *other* petroleum products flowed freely between the two states. And as the culmination of the conspiracy, the price for liquid asphalt in Oklahoma, according to the plaintiffs, was then set artificially high to the end that bids by refiners to both the state and private contractors were invariably identical and constant in the price bid. Similarly, in Kansas the Kansas refiners, free from Oklahoma competition, set their price for their liquid asphalt sold in Kansas.

"As concerns Western Missouri, it was plaintiffs' theory of the case that the Kansas and Oklahoma refiners 'cooperated' in this area and divided up the market at prices mutually agreed upon.

"Regarding Nebraska, South Dakota, Iowa, Minnesota, and Wisconsin, plaintiffs contended that the defendants and the other coconspirators did engage in real price competition in those areas. *And in our view of the record, there is evidence, both direct and circumstantial, to support this general theory of the case.*

"Upon trial, defendants objected strenuously to the introduction of any evidence pertaining to the existence of any conspiracy involving any defendant extending into Kansas or Western Missouri. Such evidence was said to be irrelevant and highly prejudicial. These objections were overruled and the defendants now assign such ruling as error necessitating a new trial on the issue of liability only. We perceive no error in this particular regard.

"The evidence of the activities of these defendants, and others, in Kansas and Missouri was a part of an overall scheme and had relevance and probative value as tending to circumstantially prove the particular facet of the conspiracy which ended in price fixing in in Oklahoma operating to the detriment of the plaintiffs. Noerr Motor Freight v. Eastern Railroad Presi-

dents Conference, 155 F.Supp. 768 (E.D. Pa. 1957), *aff'd per curiam*, 273 F.2d 218 (3d Cir. 1959); *rev'd on other grounds*, 365 U.S. 127 (1961), contains pertinent comment no this particular matter. In that case, the trial court declared as follows:

> 'Because of the magnitude and importance of the case the Court permitted great latitude in the introduction of evidence. The trial court in any antitrust case has wide discretion in the admission or exclusion of cumulative and collateral evidence * * *. The evidentiary problems arising at trial may be placed in six distinct categories. The first relates to the admission into evidence, over the strenuous objection of the defendant, of proof of activities in the railroad-Byoir campaign which occurred outside of Pennsylvania. Since the conspiracy was not originated in Pennsylvania, the proof of outside activities was important, not only to show its formation but to show its method of operation, all of which had a great bearing on the fundamental question of intent and injunctive relief, if an illegal conspiracy actually existed. The complaint charged an overall conspiracy in the whole of the northeastern part of the United States. *Because the plaintiffs limited themselves to proof of damages only within the State of Pennsylvania, the defendants contend that plaintiffs should be likewise limited in proof of the conspiracy. Such result, of course, does not follow.* * * *' (Emphasis by the Court.)

"Even assuming that the Kansas, Missouri and Oklahoma conspiracies were distinct, such does not mean that evidence of the first two is inadmissible in a case grounded on purchases made by the plaintiffs in Oklahoma. Certainly on the record before us such were so interrelated that evidence of one was some evidence of the other. *See* American Medical Ass'n v. United

States, 130 F.2d 233 (D.C. Cir. 1942), at 251-52, *aff'd*, 317 U.S. 519 (1942), and Greater New York Live Poultry Chamber of Commerce v. United States, 47 F.2d 156 (2d Cir. 1931), at 159, *cert. denied*, 283 U.S. 837 (1931).

"*In short, then, the jury in our view was entitled to know the full story and the trial court did not err in refusing to limit the plaintiffs to proof of events occurring within the territorial limits of the State of Oklahoma. See also,* for example, Kansas City Star Company v. United States, 240 F.2d 643 (8th Cir. 1957), *cert. denied*, 354 U.S. 923 (1957), where it was declared, at 650, that when intent is an issue, as it was here, it has always been deemed proper, in civil or criminal antitrust proceedings, to introduce 'evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.'" (Emphasis supplied.) [*Standard Industries, et al.* v. *Mobil, et al.*, 475 F.2d 220, 225]

As can be seen from the above, the Appellate Court conducted a careful and painstaking review of Plaintiff's evidence, and held that Plaintiffs sustained their burden of proof by probative and competent *direct and circumstantial* evidence. In the circumstances obtaining here, Petitioners' request that this Court review the "relevancy" of the conspiracy evidence is merely a transparent plea for the highest court of the land to reweigh, and reevaluate voluminous testimony for *a third* time. It is, in effect, a request for this Court to examine a very lengthy record to determine whether the court below correctly applied the substantial evidence rule. We perceive no overriding question of public importance in such a request, and respect-

fully suggest that it does not comport with the standards set forth in this Court's Rule 19, which enunciates the considerations which must ordinarily be present before a Petition for Certiorari will be granted. Without doubt the reliance by the court below on the holding in *Noerr Motor Freight* v. *Eastern Railroad Presidents Conference*, 155 F.Supp. 768 (E.D. Pa., 1957), *aff'd per curiam* 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds* 365 U.S. 127 (1961), is not a new or novel legal issue deserving attention by this Court. Additionally, we are aware of no conflict with any other circuit on the point of law involved, and Petitioners have not favored this Court with the citation of authority indicating any such conflict. There is no reason, therefore, for this Court to accept certiorari to review the issue presented by Petitioners' first question.

II

Petitioners also complain in this *civil* proceeding of the admission into evidence of the invocation of the Fifth Amendment by two corporate defendants and one individual witness. In so doing, Petitioners draw *no* distinction between the admissibility of the invocation of the Fifth Amendment privilege in a civil, instead of a criminal proceeding. Neither do they see a difference between the invocation of the Fifth Amendment privilege by an individual, as distinguished from a corporation. Petitioners' basic position is unsound and very much at odds with the plain, unambiguous language of the Fifth Amendment to the United States Constitution.

Since the deprivation of an individual's personal liberty cannot be involved in a civil proceeding, the areas of

permissible evidentiary inquiry are fundamentally different than in a criminal proceeding. Similarly, since a corporation cannot be "jailed," *it* cannot invoke the provisions of the Fifth Amendment in its own behalf. The language of the Fifth Amendment relegates its protection to *individuals* in a *criminal* proceeding:

> "No person . . . shall be compelled in any *criminal* case to be a witness *against himself.*" [Emphasis supplied.]

We respectfully submit that the Fifth Amendment was never intended to afford the "protection" argued for by Petitioners in a civil proceeding. The oil companies cite *no* civil case authority for their position, instead taking understandable, but nonetheless misplaced, refuge in the citation of criminal and quasi criminal case authority. We believe there *is* no civil case authority construing the Fifth Amendment in the manner urged by Petitioners, and we further submit that the criminal cases cited by Petitioners do not stand for the proposition so asserted by them. The holding in *Gruenwald* v. *United States,* 353 U.S. 391 (1957) is typical, and would support *a portion* of Petitioners' argument if the instant cause had been a crimnial case, which it obviously is not. It is true that the Fifth Amendment prevents a witness from being required to testify *against himself* in a criminal proceeding; however, just the opposite is true in a civil case where a witness or a party *may be required to testify against himself*. This is specifically so provided by Rule 43, F.R.C.P.:

> ". . . A party may call an adverse party or an officer, director or managing agent of a public or private corporation . . . and interrogate him by leading questions

and contradict and impeach him in all respects as if he had been called by the adverse party. . . ." Rule 43(b), F.R.C.P.

And a civil jury—unlike its criminal counterpart—can infer what it will from a defendant's forced testimony. If a witness is required to take the witness stand, and is evasive, untruthful, incomplete in his answers to pertinent questions, or, as is the case here, the witness refuses to answer the pertinent questions at all, the civil jury can draw an adverse inference from those circumstances. This distinction has been specifically recognized—even in criminal cases. For example, in the holding of the 1st Circuit Panel in *Maffie* v. *United States*, 209 F.2d 225 (1st Cir., 1954), the following is found regarding the permissible inference which can be drawn from the invocation of the Fifth Amendment in a civil case:

> "Sometimes it is said that one who claims the privilege impales himself on the horns of a dilemma; either he is obviously a criminal, or else he is a liar and a perjurer in stating under oath that he declines to answer because a truthful answer would incriminate him. Occasionally, but probably infrequently, this may be so. It depends upon the nature of the question.
>
> "Suppose the question is: 'Did you pick X's pocket and steal his wallet?' Only a 'yes' answer could be incriminating, and if the witness claims his privilege, the fair inference is that he must be a pickpocket and a thief. That natural inference might be drawn to his detriment in the ordinary affairs of life—for instance, a bank might conclude that such a person could hardly be a good risk for employment as a teller, if he has gotten himself in such a fix that he cannot answer a question like that. *The only place such inference can-*

not be drawn is at a criminal trial; the prosecution cannot build up its case upon an incriminating inference from the accused's previous claim of privilege." (Emphasis supplied.) *Id.*, 209 F.2d 227-228.

Numerous legal commentators have recognized the valid inference which may be drawn from the invocation of the Fifth Amendment in a civil case:

> "On the other hand, the 5th Amendment does not guarantee that a person who invokes it will not be subject to any unfavorable inference. It is an irresistible, logical inference that if a witness in any proceeding refuses to reply to a question on the ground that his response may tend to incriminate him, he impliedly admits that any truthful answer he might give would tend to prove that he had committed a criminal act. . . . So, while claim of the privilege may not be used against the defendant in a subsequent criminal prosecution, an inference that his testimony would have been unfavorable to him is available to his opponent in a civil cause in which defendant pleads the privilege; . . ." 98 C.J.S., *Witnesses*, §455, pp. 307-308.

Particularly is the inference both logical and irresistible where the refusal to testify is in response to questions unmistakenly pertinent to the very facts upon which the civil action is based. See Gard, *Jones on Evidence*, 6th Ed. (1972) Vol. 4, §22.12, page 38; and *Wigmore on Evidence*, 3d Ed., Vol. VIII, §2254, page 327.

The specific interrogatory and the answer given by Defendant Allied Materials Corporation is set forth on page 8 of the Petition. As is readily apparent, that corporation attempted to assert a non-existent 5th Amendment privilege as justification for evading a pertinent interrogatory.

What is not apparent on the face of the Petition is that the invocation of the Fifth Amendment was in the form of an "answer" to an interrogatory rather than an "objection," as stated by Petitioners. Plaintiffs themselves objected to the answer as not being responsive to the interrogatory. [*Transcript of Hearing on Interrogatories*, January 30, 1968, R. 123, pp. 7-30; A. 3202-3209.] The record reflects that as Allied Materials Corporation insisted upon its Fifth Amendment "right," all other corporate defendants adopted Allied's position as their own, and likewise refused to provide the requested information. The trial court approved the Defendants' position and permitted the answer to stand. We think it is obvious that the trial court's ruling was erroneous because a corporation cannot claim the protection of the Fifth Amendment. However, we respectfully submit that the Defendants *cannot* have the best of two worlds and refuse to answer pertinent interrogatories addressed to their illegal activities on the basis that such answers would violate a non-existent "corporate 5th Amendment privilege," and after once leading the trial court into error by approving such an incomplete and evasive answer, subsequently prevent the jury from being apprised of those circumstances.

The judicial admission made by Defendant Wilshire Oil Company of Texas was relevant to the issues joined in the trial court, and otherwise comported with the general rule of law governing judicial admissions. See *Rogers* v. *Edward L. Burton & Co.*, 137 F.2d 284, 286 (10th Cir., 1943); *Frank R. Jelleff, Inc.* v. *Braden*, 233 F.2d 671, 675-677 (D.C. Cir., 1956); and Wigmore on Evidence (3d Ed.), IV, §§1058, 1059, 1066 and 1067.

Petitioners make the comment that neither *Allied nor Wilshire* were parties to the action at the time the evidence was admitted; however, the record will reflect, to the contrary, that those two corporations were, indeed, parties to the action *at the time the evidence was received.* They were subsequently dismissed by the court on the motion of defendants.

The "non-party" witness whose invocation of his Fifth Amendment privilege was read to the jury was Warren Smith. Mr. Smith was the managing agent of Union Asphalt and Road Oils, Inc., a Missouri corporation which marketed liquid asphalt for Defendant Phillips Petroleum Company pursuant to a written marketing contract. During the period of the conspiracy Mr. Smith had functioned as a direct agent of Defendant Phillips Petroleum Company. Further, Mr. Smith was named by another witness, Harold Malloy, as the person who "explained" Malloy's part in the conspiracy to him when Malloy was employed by Union Asphalt and Road Oils, Inc. The question to which the witness "took the 5th" is set forth on pages 8-9 of the Petition. The question addressed to him was pertinent, and relevant to the issues joined in the trial court. The witness' refusal to answer, in this civil proceeding, was a circumstance which the jury could consider in determining the guilt of the Defendants, including Phillips Petroleum Company.

CONCLUSION

We respectfully submit that although the invocation of the Fifth Amendment privilege by the witness Smith may have been *arguably* proper (since he had not been indicted or convicted in either Kansas or Oklahoma), the invocation of the Fifth Amendment privilege by the corporate defendants was obviously improper. In either event, however, the fact that the Fifth Amendment privilege was invoked in answer to pertinent questions was a proper and relevant circumstance for the jury to consider in this civil proceeding. The fact that the corporate defendants improperly invoked a non-existent Fifth Amendment privilege should not inure to their benefit. The effect of the various trial court rulings eventually resulted in the *improperly* invoked Fifth Amendment privilege being treated the same as would a *properly* invoked Fifth Amendment privilege. The jury was allowed to consider those circumstances in determining the guilt of the Defendants. There appears to be no conflict within the various Circuit Courts of the United States on this subject, and there is no reason, we submit, for this Court to review this question. The petition should, therefore, be denied.

Respectfully submitted,

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July, 1973

CERTIFICATE

This is to certify that the attached brief in opposition has been served by mailing three copies thereof to Counsel for each Petitioner.

Dated this ..... day of July, 1973.

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John Anthony Claro